82-491

No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

RSR CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE *FIFTH* CIRCUIT

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JERROLD J. GANZFRIED
Assistant to the Solicitor General
JANIS H. KOCKRITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, when Congress recodified the Interstate Commerce Act "without substantive change," it "inadvertently" repealed pre-existing criminal penalties for violations by private carriers of the Federal Motor Carrier Safety Regulations.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-15a) is reported at 664 F.2d 1249.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 16a) was entered on January 4, 1982. A timely petition for rehearing was denied on June 23, 1982 (App. C, *infra*, 17a-18a). On August 16, 1982, Justice White extended the time for filing a petition for a writ of certiorari to and including September 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 204(a)(3) of the Interstate Commerce Act, 49 U.S.C. 304(a)(3) provides:

> (a) It shall be the duty of the [Interstate Commerce] Commission—
>
> * * * * *
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

2. 49 U.S.C. (Supp. IV) 11909(b) provides:

> A person required to make a report to the [Interstate Commerce] Commission, answer a question, or make, prepare, or preserve a record under this subtitle about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question in 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willfully falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7)

knowingly and willfully makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

3. 49 U.S.C. 1655(e)(6)(C) provides:

(e) There are hereby transferred to and vested in the Secretary [of Transportation] all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers and offices thereof, under—

* * * * *

(6) the following provisions of the Interstate Commerce Act, as amended—

* * * * *

(C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and sections 204(a)(3), 3(a), and (5) (49 U.S.C. 304).

4. 49 U.S.C. 1655(f)(2)(A) and (B) provides:

(2)(A) With respect to any function which is transferred to the Secretary [of Transportation] by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).

(B) For purposes of this paragraph—

(i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions

under the following provisions of the Interstate Commerce Act, as amended: * * * section[ ] * * * 222 [codified as 49 U.S.C. 322, recodified as 49 U.S.C. 11909] (except subsections (b)(2) and (b)(e) thereof) * * *.

STATEMENT

1. Respondent RSR Corporation ("RSR") sells lead obtained from recycled batteries and uses a large fleet of privately owned trucks to transport its property across state lines (June 6, 1980 Tr. 7).[1] As such, it is one of approximately 108,000 private motor carriers subject to the jurisdiction of the Department of Transportation (DOT), which regulates carrier safety. In 1969 and 1973, during safety compliance surveys of RSR's motor carrier operations, DOT investigators found numerous violations of the Federal Motor Carrier Safety Regulations. Some of those violations concerned drivers' daily log books. On both occasions, RSR promised that it would institute procedures to correct the deficiencies (July 11, 1980 Tr. 45, 47-48).

A third safety compliance survey of RSR's operations in 1979 revealed hundreds of violations of the motor carrier safety regulations, including at least two instances in which RSR failed to report a major accident involving one of its vehicles (July 11, 1980 Tr. 46, 48-49). Accordingly, on April 21, 1980, the government filed a criminal information in the United States District Court for the Northern District of Texas charging RSR with eight counts of maintaining false daily driver logs, in violation of 49 U.S.C. (Supp. IV) 11909(b) and

[1] "June 6, 1980 Tr." refers to the transcript of a hearing in the district court on RSR's motion to dismiss the information. "June 23, 1980 Tr." refers to the transcript of the plea hearing in the district court. "July 11, 1980 Tr." refers to the sentencing hearing.

49 C.F.R. 395.8.[2] The information alleged that RSR knowingly and willfully maintained logs indicating that drivers were off duty when in fact they were not (June 23, 1980 Tr. 22-25).

RSR moved to dismiss the information on the ground that Section 11909(b) does not prescribe criminal penalties for private carriers such as itself. The district court denied RSR's motion (June 16, 1980 Tr. 17), and RSR pleaded guilty to five counts of the information (June 23, 1980 Tr. 22-24, 31). Following RSR's plea of guilty, it was fined $5,000 on each of the five counts and the remaining three counts were dismissed (July 11, 1980 Tr. 50-51).

2. The court of appeals vacated RSR's convictions, holding that, as a result of the 1978 recodification of the Interstate Commerce Act (Pub. L. No. 95-473, 92 Stat. 1337), criminal penalties for violations of 49 C.F.R. 395.8 no longer applied to private motor carriers. Although the court recognized that Congress expressly stated in Section 3(a) of the 1978 recodification that the act "may not be construed as making a substantive change in the laws replaced" (Pub. L. No. 95-473, 92 Stat. 1466),[3] it found that Congress nonetheless had

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[2] 49 U.S.C. (Supp. IV) 11909(b) imposes criminal penalties for willfully maintaining false records, including records required by 49 C.F.R. 395.8, which provides in pertinent part:

> (a) Except as provided in § 395.9 and paragraph (t) of this section, every motor carrier shall require that a driver's daily log, form MCS-59, shall be made in duplicate by every driver used by the carrier and every driver who operates a motor vehicle shall make such a log. Failure to make logs, failure to make required entries therein, falsification of entries, or failure to preserve logs shall make both the driver and the carrier liable to prosecution * * *.

[3] Section 3 of the Act, entitled "Legislative Purpose and Construction," provides in pertinent part (Pub. L. No. 95-473, 92 Stat. 1466):

> (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were

"inadvertently" made a major change—the repeal of criminal penalties for violations of safety regulations by private motor carriers.

The recodified penalty provision (49 U.S.C. (Supp. IV) 11909(b)) replaced 49 U.S.C. 322(g). It generally tracked the language of Section 322(g), but included, in the panel's view, one significant change: a reference to "transportation subject to the jurisdiction of the [Interstate Commerce] Commission." The court concluded that, because the 1966 Department of Transportation Act had transferred the ICC's authority to regulate private motor carriers to the DOT, the ICC had no such jurisdiction at the time of recodification. Therefore, the recodified provision did not apply to private motor carriers because, in the court's view, such carriers were not "subject to the jurisdiction" of the ICC. Accordingly, the court held that the 1978 recodification stripped the DOT of enforcement powers over its own regulations issued pursuant to 49 U.S.C. 304(a)(3).

The court reached this conclusion even though it recognized that "Congress intended no substantive change in the Interstate Commerce Act and related laws" (App. A, *infra*, 6a). Moreover, the court noted that there is no dispute "that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. § 322(g)" prior to the recodification (App. A, *infra*, 8a; see *id.* at 2a). Finally, after reviewing the

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replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. * * *

* * * * *

(c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

legislative history, the court concluded that it was unambiguously clear that Congress intended to preserve criminal sanctions in the situation: "this is what Congress clearly meant to say, intended to say, and wanted to say" (*id.* at 10a). The court nevertheless declined to follow what it recognized to be the manifest intent of Congress; instead, it considered itself bound by the doctrine of strict construction and reversed RSR's convictions.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the authority and responsibility of the Department of Transportation (DOT) to regulate private motor carriers. The decision below strips DOT of authority to promulgate mandatory regulations for almost two-thirds of the carriers that are currently subject to its jurisdiction. The potential impact of the decision below is illustrated by the following figures: DOT's Federal Highway Administration currently promulgates safety regulations for some 180,000 carriers, including more than 108,000 private carriers who operate approximately 850,000 vehicles. Thus, DOT's ability to assure safety on the nation's highways will be severely restricted unless the decision below is reversed. Indeed, the adverse consequences of the court of appeals' decision already have begun to emerge. On September 2, 1982, a district court, relying on the decision below, granted a motion to vacate a two-year old criminal conviction under a companion provision of the Interstate Commerce Act. *United States* v. *Faygo Beverages, Inc.*, Cr. No. 80-80509 (E.D. Mich.). When placed in context, the implications of this decision are clear. The Federal Highway Administration's regional office in Ft. Worth, which covers Texas, New Mexico, Louisiana, Arkansas and Oklahoma (an area embracing a large part of the Fifth Circuit), estimates that in the years 1978-1981 it

recommended the prosecution of almost 40 criminal cases against private carriers. Many of those prosecutions could be undermined by the decision of the court of appeals in this case.[4]

Without the criminal penalties Congress enacted, DOT would be left without any effective means of enforcing its safety regulations for private motor carriers. Under the decision below, those regulations would no longer be mandatory but merely precatory because no enforcement mechanism would remain. This is contrary to the express language and legislative history of the recodification of the Interstate Commerce Act, and is at odds with numerous decisions of this Court that hold that penal statutes are not to be construed in a manner that defeats Congress' manifest intent. The judgment in the present case, moreover, cannot be reconciled with the recent decision of the Second Circuit in *United States* v. *Rossetti Brothers*, 671 F.2d 718 (1982), which rejected the same arguments that prevailed in the Fifth Circuit. Review by this Court is necessary in order to resolve this split in circuit court authorities in a manner that will allow DOT to fulfill its statutory mandate of ensuring safety on the nation's highways.

1. Prior to 1966, the Interstate Commerce Commission (ICC) was empowered to regulate aspects of transportation of property by motor carriers engaged in interstate commerce (see ch. 498, 49 Stat. 543 (49 U.S.C. 1 *et seq.*)). While all such carriers were subject to ICC jurisdiction, the extent of regulation depended upon

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[4] Any of those cases still pending within the Fifth Circuit would be subject to the holding in the present case. Moreover, even terminated cases would be subject to collateral attack if the theory of the district court in *Faygo Beverages*, *supra*, were followed.

The Ft. Worth office is one of the nine Federal Highway Administration regional offices. Other regional offices have reported comparable caseloads.

whether the carrier was classified as a common, contract, or private carrier. Section 204(a)(3) of the Interstate Commerce Act (49 U.S.C. 304(a)(3)), gave the Commission powers to promulgate regulations governing the safety of private motor carriers. And Section 222(g), 49 U.S.C. 322(g) (now codified at 49 U.S.C. (Supp. IV) 11909(b)) provided criminal penalties for failure to comply with those regulations.

In 1966, the Department of Transportation was created (Pub. L. No. 89-670, 80 Stat. 931, (codified at 49 U.S.C. 1651 *et seq.*)) and certain functions previously performed by the ICC were transferred to DOT. Among the functions so transferred were those relating to "qualifications and maximum hours of service of employees and safety of operation and equipment [under] * * * sections 204(a)(3), (3a), and (5) (49 U.S.C. 304)." 49 U.S.C. 1655(e)(6)(C). In addition, 49 U.S.C. 1655(f) expressly provided that DOT was vested with the same functions and administrative powers the ICC had enjoyed under 49 U.S.C. 322. Thus, plenary power to adopt regulations governing private carriers and to enforce those regulations by criminal prosecution, previously within the jurisdiction of the ICC, was transferred directly to DOT. See *United States* v. *Youngstown Cartage Co.*, Fed. Carr. Cas. (CCH) ¶ 82,383 (N.D. Ohio Jan. 10, 1973).[5]

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[5] The district court in *Youngstown Cartage* provided a succinct summary of the state of the relevant law with respect to private carriers following enactment of the 1966 Department of Transportation Act (Fed. Carr. Cas. (CCH) ¶ 82,383 at 56,062 to 56,063):

> [T]he powers, duties and functions of the ICC including its regulations were transferred to DOT. One of these powers, duties and functions carried over concerns the maximum hours of service of employees and safety operation and equipment * * *. The Act also transferred to DOT the administrative power to pr[e]scribe regulations and enforce provisions of the chapter dealing with motor carriers.

This statutory scheme was not revisited until 1978 when Congress, recognizing that intervening amendments had left the substantive provisions of federal transportation law scattered among various codified and uncodified sections, undertook to restate the Interstate Commerce Act and related laws "without substantive change" and to enact those laws as subtitle IV of the 49th title of the United States Code. See 124 Cong. Rec. 30172 (1978) (remarks of Reps. Eilberg, McClory).[6] That this recodification was intended to effect no substantive change was reflected not only in the legislative history, but also in the statutory language. To this end, Section 3(a) of the recodification statute (Pub. L. No. 95-473, 92 Stat. 1466), entitled "Legislative Purpose and Construction," states that "Sections 1 and 2 of this Act restate, *without substantive change*, laws enacted before May 16, 1978, that were replaced by those sections. Those sections *may not be construed as making a substantive change in the laws replaced*" (emphasis added). In addition, Section 3(c) provides that "[a]n order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act *continues in effect* under the corresponding provision enacted by this Act until repealed, amended, or superseded" (emphasis added). And Section 3(d) provides that offenses committed under replaced sections are "deemed to have been * * * committed under" the recodified sections.

The Act also contains a significant savings provision which in substance, provides that whenever a function, power or duty is transferred, reference in any other federal law to the power transferred shall be deemed to mean the party to whom the power, duty or function was vested.

[6] The 1978 recodification was the first part of an ongoing legislative project to restate and codify federal transportation law. Future revisions and codifications will include subtitle I of title 49. See H.R. Rep. No. 1395, 95th Cong., 2d Sess. 5 (1978); see also *United States* v. *Rossetti Brothers*, *supra*, 671 F.2d at 720 n.6.

Among the sections of the Interstate Commerce Act thus restated "without substantive change" was 49 U.S.C. 322(g) (currently codified at 49 U.S.C. (Supp. IV) 11909(b)),[7] which imposes criminal penalties on private carriers that, like respondent RSR, "knowingly" and "willfully" maintain false records in violation of safety regulations. The significance of these criminal sanctions in the statutory scheme can scarcely be overstated. They are the only means Congress prescribed for enforcement of DOT safety and recordkeeping regulations. In the absence of criminal enforcement, the regulations covering important questions of public safety would be, as the Second Circuit recognized in *United States* v. *Rossetti Brothers*, *supra*, 671 F.2d at 720 "reduce[d] * * * to precatory provisions." In that event, the 108,000 private carriers under DOT's jurisdiction would be subject to no effective regulation under the Interstate Commerce Act.

The clear import of 49 U.S.C. (Supp. IV) 11909(b), when read in the context of the recodification statute of which it was a part, is that the pre-existing criminal sanctions would continue "without substantive change" and that pre-existing regulations would "continue[] in effect." Under settled rules of statutory construction, this statutory context may not be overlooked. It is well established that "a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling [its] responsibility in interpreting legislation [this Court] 'must not be guided by a single sen-

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[7] In the process of recodification a minor language change was made in this section. Where Section 322(g) had referred to "[a]ny motor carrier * * * who shall willfully fail or refuse to make a report to the Commission as required by this chapter * * *," the replacement provision, Section 11909(b), refers to "[a] person required to make a report to the Commission * * * about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title * * *."

tence or member of a sentence, but [should] look to the provisions of the whole law * * *'." *Richards* v. *United States*, 369 U.S. 1, 11 (1962) (footnote omitted). Accord, *United States* v. *Turkette*, 452 U.S. 576, 587-588 n.10 (1981); *United States* v. *Naftalin*, 441 U.S. 768, 772-774 (1979); *Bifulco* v. *United States*, 447 U.S. 381, 388-390 (1980); *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 288 (1957); see *United States* v. *Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1850); 2A C. Sands, *Sutherland Statutory Construction* § 46.05 (1973). Thus, "courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions * * *." *United States* v. *Bass*, 404 U.S. 336, 344 (1971). Indeed, even in the context of sentencing provisions in penal statutes, a single phrase should not be construed in isolation from the statutory scheme as a whole when to do so would result in a meaning that contradicts or distorts "the fair import of the whole remaining language." *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948); see, *e.g.*, *United States* v. *Campos-Serrano*, 404 U.S. 293, 298 (1971); *United States* v. *Bass*, *supra*, 404 U.S. at 350-351.

Rather than interpret Section 11909(b), as it should have, in the context of the statute of which it was a part, the court of appeals focused on a minor language change in the recodification (see note 7, *supra*). By limiting its scope of inquiry to the words "subject to the jurisdiction of the Commission" (49 U.S.C. (Supp. IV) 11909(b)), the court rendered an unduly narrow interpretation wholly at odds with the stated objective of Congress. Thus, the court concluded that, because authority to regulate private carriers had been transferred from the ICC in 1966, the 1978 statutory reference to ICC jurisdiction could not have included such carriers. In so concluding, the court effectively ignored both the Department of Transportation Act of

1966, which transferred the relevant ICC powers, and the express language of the 1978 recodification, which instructed the federal courts to construe Section 11909(b) as "not * * * making a substantive change." Construing Section 11909(b) as making no substantive change requires a conclusion different from that of the court of appeals—*i.e.*, that once the "jurisdiction of the Commission" was transferred to DOT, DOT was invested with full power to assure private carrier safety by promulgating regulations enforced by criminal sanctions.

2. The court of appeals believed that the language of Section 11909(b) abolished criminal jurisdiction over private carriers for violations of safety regulations, even though it recognized that the legislative history conclusively showed that Congress intended to preserve that jurisdiction. App. A, *infra*, 10a ("this is what Congress clearly meant to say, intended to say, and wanted to say"). Yet, feeling bound by its restrictive reading of the statute and the rule of lenity, the court held that "Congress did not say it" (*ibid.*). As explained above, the court erred in its interpretation of the language of the statute; beyond this, however, it erred in failing to give effect to Congress' intent as expressed in the legislative history. See *United States* v. *Rossetti Brothers*, *supra*, 671 F.2d at 720 ("[w]here Congress's purpose is frustrated by a rigid application of statutory language, common sense and evident statutory purpose must inform a court's construction of the statute").

Contrary to the view of the court of appeals, the rule of lenity is merely "a[] guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), which is not applicable unless there is such a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) that even "[a]fter [a court has] 'seiz[ed] every thing from which aid can be derived * * *' [it is

still] left with an ambiguous statute." *United States* v. *Bass*, *supra*, 404 U.S. 347, quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). As this Court observed in *United States* v. *Moore*, 423 U.S. 122, 125 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, *e.g.*, *United States* v. *Naftalin*, 441 U.S. 768, 778-779 (1979), *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977); *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975); *id.* at 795 (Douglas, J., dissenting); *id.* at 798 (Brennan, J., dissenting); *United States* v. *Moore*, 613 F.2d 1029, 1043-1045 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980).

Moreover, as this Court noted in *United States* v. *Culbert*, *supra*, 435 U.S. at 379, the rule of lenity applies only when a statute is genuinely ambiguous, or uncertainty exists as to Congress' intent. See also *United States v. Batchelder*, 442 U.S. 114, 121 (1979). Thus, the rule of lenity is not implicated here. As we have shown, the recodification plainly negates any suggestion that criminal sanctions were intended to be repealed. Moreover, the statute's legislative history shows—without a shred of evidence to the contrary—that Congress "intended merely to transplant [the penalty] section, renumbered into the recodified portion of the Act." *United States* v. *Rossetti Brothers*, *supra*, 671 F.2d at 720.[8]

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[8] *Rossetti Brothers* involved a companion provision to the one at issue in this case (49 U.S.C. (Supp. IV) 11914(b)), which is

Since Congress' intent is clearly expressed in the legislative history, as the court of appeals recognized, the court erred in failing to give weight to the legislative history in rendering its interpretation.

3. Even if the rule of lenity were relevant to this case, the court of appeals seriously erred in its application of the rule. As this Court has held (*United States* v. *Brown*, *supra*, 333 U.S. at 25-26), no rule of statutory construction requires

> magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States* v. *Gaskin*, 320 U.S. 527, 530, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation."

See *United States* v. *Turkette*, *supra*, 452 U.S. 587-588 n.10; *United States* v. *Moore*, 423 U.S. 122, 145 (1975); see also *Barrett* v. *United States*, 423 U.S. 212, 218 (1976); *United States* v. *Cook*, 384 U.S. 257, 262 (1966).

In this case, Congress' intent that the 1978 legislation work no substantive change is manifest. The court of appeals' conclusion that criminal jurisdiction was "inadvertently" stripped from the Interstate Commerce Act is precisely the kind of conclusion that Congress sought to prevent by the plain language of its savings provisions.[9] Moreover, the court's conclusion directly

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the recodification of 49 U.S.C. 322(a)). The legislative history involved is precisely the same for both provisions and, as is clear from the Second Circuit's analysis, there is no doubt that that court would disagree with the Fifth Circuit's decision here.

[9] See note 3, *supra*; see also H.R. Rep. No. 1395, 95th Cong., 2d Sess. 4, 9–10 (1978):

> The purpose of the bill is to restate in comprehensive form, without substantive change, the Interstate Commerce Act and related laws, and to enact those laws as subtitle IV of title 49, United States Code.

conflicts with the established presumption that recodifications are not meant to make substantive changes in previous statutes. See *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 227-228 (1957); *United States* v. *Cook*, 384 U.S. 257, 262 (1966); *Cass* v. *United States*, 417 U.S. 72, 82 (1974).[10] If legislative intent could be thwarted by mechanical application of the "rule of lenity," congressional attempts to restate complex legislation would be hampered and the current effort to recodify the Interstate Commerce Act would be burdened by the need for correcting amendments before Congress could proceed to the next stage of its recodification process.[11] Such a result is not demanded by the "rule of lenity," which should only be utilized when a court's "* * * interpretation can be

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* * * * *

> *Substantive change not intended.*—Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive changes in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged.

[10] Indeed, this Court's recent decision in *Bifulco* v. *United States*, 447 U.S. 381, 400 (1980), establishes that clearly expressed legislative intent overrides inadvertent or inartful draftsmanship. See also *Cass* v. *United States*, *supra*, 417 U.S. at 81-82; *Greenwood* v. *Peacock*, 384 U.S. 808, 815-816 (1966).

[11] A bill recently has been introduced in Congress as part of the ongoing recodification of the Interstate Commerce Act. In light of the decision below, that bill contains provisions that would amend the Act in a manner that addresses the concerns expressed by the court of appeals. H.R. 6998, 97th Cong., 2d Sess. §§ 6, 522 (1982). We shall advise the Court of material developments with respect to this pending bill insofar as they relate to the issues raised in this petition.

based on no more than a guess as to what Congress intended." *Bifulco* v. *United States*, *supra*, 447 U.S. at 387. It should not be used to directly contradict legislative intent or to reach what the Second Circuit correctly characterized as an "anomalous result." *United States* v. *Rossetti Brothers*, *supra*, 671 F.2d at 720.

Moreover, this case does not involve the factors that typically have formed the basis for this Court's invocation of the rule of lenity. First, there is no serious dispute that RSR received "fair warning" of the requirements of the law (*United States* v. *Bass*, *supra*, 404 U.S. at 348). RSR clearly had notice of the required conduct from prior compliance surveys that disclosed numerous violations and evoked corporate promises to remedy the violations. In addition, RSR's guilty plea admitted making, in the words of the statute, "willful[ ]" and "knowing[ ]" falsifications in its reports, and the testimony at the plea hearing established the factual basis for the conviction (June 18, 1980 Tr. 31-36). Moreover, 49 C.F.R. 395.8 expressly states that any violation "shall make * * * the carrier liable to prosecution" (see note 2, *supra*), and RSR has never questioned the application of this regulation. Thus, this is not a case involving inadvertent violations of regulatory requirements of which RSR was unaware.[12]

Second, this case does not present the other basis for the holding in *United States* v. *Bass*, *supra*, 404 U.S.

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[12] The court of appeals noted that "[t]he parties do not dispute that the information would have been proper if RSR had been charged with a violation of [the predecessor statute] 49 U.S.C. 322(g) and if that statute were still in effect" (App. A, *infra*, 8a). Section 3(c) of the recodification (see note 3, *supra*) expressly provides that any "regulation in effect under a law replaced [by the recodification] * * * *continues in effect* under the corresponding provision enacted by this Act * * *" (emphasis added). And Section 3(d) provides that offenses committed under replaced sections are "deemed to have been * * * committed" under the recodified sections.

at 348: "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should'" (quoting H. Friendly, *Benchmarks, Mr. Justice Frankfurter and the Reading of Statutes*, 196, 209 (1967)). RSR is a corporate defendant subject only to the same penalty (a fine) traditionally imposed in civil or administrative proceedings.

Third, unlike *Williams* v. *United States*, No. 80-2116 (June 29, 1982), slip op. 11, this is not a case in which the "legislative history * * * fails to evidence congressional awareness of the statute's claimed scope." As we have demonstrated, the government's interpretation is the only one Congress considered and Congress made its intent clear in Section 3 of the recodification statute.

Finally, also unlike *Williams* v. *United States*, *supra*, slip op. 11, this case does not involve "subject matter that has traditionally been regulated by state law." The enforcement powers at issue here have long been exercised by the ICC and more recently by DOT. Moreover, there can be no dispute that application of safety standards to private carriers engaged in interstate commerce is a subject properly within the purview of federal law.

In short, no rule of statutory construction compels a court to disregard the express language and structure of a statute, or to ignore the unqualified expression of intent contained in the legislative history. Under governing canons of statutory construction as often pronounced by this Court and as applied by the Second Circuit in *United States* v. *Rossetti Brothers*, *supra*, the only proper result is to read the recodification precisely as Congress directed—as restating prior law "without substantive change."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
JERROLD J. GANZFRIED
Assistant to the Solicitor General
JANIS H. KOCKRITZ
Attorney

SEPTEMBER 1982

APPENDIX A

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RSR CORPORATION, DEFENDANT-APPELLANT.

No. 80-1782

United States Court of Appeals,
Fifth Circuit.*
Unit A

Jan. 4, 1982.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

This case presents the issue of whether Congress inadvertently changed the application of certain criminal penalty provisions for violation of federal motor safety regulations when it recently recodified the Interstate Commerce Act. We conclude that Congress has done so.

The primary business of defendant RSR Corporation is the recycling of salvaged batteries and the selling of lead taken from these batteries. RSR operates a large fleet of trucks in the course of its business. These trucks are not for hire, and they are used to transport RSR's property across state lines. On April 21, 1980 the government filed an information containing eight

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

counts against RSR charging a criminal violation of the Federal Motor Carriers Safety Regulations. Specifically, the government charged that RSR had maintained false daily driver logs in violation of 49 C.F.R. 395.8.[1] It claimed that a violation of these regulations subjected RSR to criminal penalties under 49 U.S.C. § 11909(b), which imposes fines for willful falsification of such records. RSR moved to dismiss the counts of the information on the grounds that it was a private motor carrier and that § 11909(b) did not apply criminal penalties to private carriers. The trial court denied RSR's motion on June 16, 1980. On June 23, 1980, RSR entered a plea of guilty to counts 1, 3, 5, 7, and 8 of the information. The other counts were dismissed. RSR now appeals from the denial of its motion to dismiss the entire information. We reverse.

Our view, simply stated, is that due to the 1978 recodification of the Interstate Commerce Act, criminal penalties for violations of 49 C.F.R. § 395.8 no longer apply to private motor carriers.[2] The language of the present penalty provision, 49 U.S.C. § 11909(b), compels this result, even though the corresponding pre-recodification provision, 49 U.S.C. § 322(g), would have permitted penal sanctions against private carriers.

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[1] 49 C.F.R. § 395.8 (1980) provides, in pertinent part:

> *§ 395.8 Driver's daily log.*
>
> (a) Except as provided in § 395.9 and paragraph (t) of this section, every motor carrier shall require that a driver's daily log, form MCS-59, shall be made in duplicate by every driver used by the carrier and every driver who operates a motor vehicle shall make such a log. Failure to make logs, failure to make required entries therein, falsification of entries, or failure to preserve logs shall make both the driver and the carrier liable to prosecution. . . .

[2] The government has not contested for purposes of this appeal that RSR is a private motor carrier within the meaning of the Interstate Commerce Act. *See* 49 U.S.C. § 10102(14).

To understand why this is so, a discussion of the history of the relevant statutory provisions of the Interstate Commerce Act is necessary.

Statutory History

Congress enacted Part II of the Interstate Commerce Act on August 9, 1935. Pub.L. No. 74-225, 49 Stat. 543 (originally codified at 49 U.S.C. §§ 301-327; presently codified in scattered sections of 49 U.S.C.). The new additions to the Interstate Commerce Act empowered the Interstate Commerce Commission to regulate various aspects of transportation of property by motor carriers engaged in interstate commerce, depending upon whether the carrier was classified as a common, contract, or private carrier. Section 204(a)(3) of the new Act, as codified in 49 U.S.C. § 304(a)(3), gave the ICC powers to promulgate regulations governing the safety of operations of private motor carriers:

> (a) It shall be the duty of the Commission—
>
> . . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

At issue in this case are a set of regulations issued under authority of 49 U.S.C. § 304(a)(3) describing requirements for keeping and maintaining accurate daily driver logbooks. 49 C.F.R. § 395.8.

The penalty provisions for failure to comply with these regulations were originally contained in 49 U.S.C. § 322(g) (current version at 49 U.S.C. § 11909(b)):

> Any *motor carrier*, broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission *as required by this chapter*, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file with the Commission any false report, account, record or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this chapter to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject to each offense to a fine of not more than $5,000. As used in this subsection the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained. (emphasis added)

These penalty provisions applied to private motor carriers because of § 304(a)(3), which specifically mentions § 322(g) as a provision where the definition of "motor carrier" includes private carriers.

On October 15, 1966, Congress created the Department of Transportation by means of Pub.L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. §§ 1651 *et seq.*)

(hereinafter referred to as the "Department of Transportation Act"). Congress transferred the ICC's authority to regulate private motor carriers under § 304(a)(3) to the DOT. 49 U.S.C. § 1655(e)(6)(C) provided that:

> (e) There are hereby transferred to and vested in the Secretary [of Transportation] all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—
>
> . . . . .
>
> (6) the following provisions of the Interstate Commerce Act as amended—
>
> (C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service employees and safety of operation and equipment; and sections 204(a)(3), (3a), and (5) (49 U.S.C. 304).

49 U.S.C. § 1655(f) gave the DOT several functions and administrative powers formerly held by the ICC, including those under § 322(g):

> . . . .
>
> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).
>
> (B) For purposes of this paragraph—

(i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: ... section[ ] ... 222 [codified as 49 U.S.C. § 322] (except subsections (b)(2) and (b)(3) thereof) ...

After the passage of the Department of Transportation Act, regulation of private motor carriers was no longer under the jurisdiction of the ICC. 49 U.S.C. § 1655(f)(2)(A).

On October 17, 1978, in a laudatory effort to recodify parts of the Interstate Commerce Act, Congress enacted Pub.L. No. 95-473, 92 Stat. 1337 (codified at 49 U.S.C. §§ 10101-11916) (hereinafter referred to as the "Recodification Act"). It is undisputed that through this recodification, Congress intended no substantive change in the Interstate Commerce Act and related laws. *See* H.R.Rep. No. 95-1395, 95th Cong., 1st Sess. 4, 9-10 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 3009, 3012-13, 3018. The purpose of the recodification was merely to simplify language, replace obsolete terms, and eliminate superseded and obsolete material.[3]

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[3] The legislative history is echoed in the words of the Recodification Act itself. Section 3 of the Act, entitled "Legislative Purpose and Construction," stated that:

(a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this act are considered as superseding it to the extent of the inconsistency.

(b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in the regulation, order or other law, is deemed to refer to the corresponding provision enacted by this Act.

Nevertheless, the provision enacted by Congress to replace 49 U.S.C. § 322(g), 49 U.S.C. 11909(b), differs significantly from the former provision in its language:

> A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle *about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title*, or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question in 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willfully falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7) knowingly and willfully

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(c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all invalid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1466.

> makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

(emphasis added).

By its terms 49 U.S.C. § 11909(b) does not apply to private motor carriers, since these are not within the jurisdiction of the ICC due to the 1966 Department of Transportation Act.[4] Hence, argues RSR, the penalty provisions of § 11909(b) do not apply to it and the government's information against RSR under § 11909(b) should have been dismissed.

The parties do not dispute that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. § 322(g) and if that statute were still in effect. However, the government concedes that § 322(g) has been repealed by the Recodification Act because it has been replaced by § 11909(b). The Act requires that any reference to a former statute be deemed a reference to its replacement. Thus, under the Department of Transportation Act, 49 U.S.C. § 1655, the DOT has the power to promulgate regulations for private carriers under § 304(a)(3), for that section has not yet been recodified and remains in force. However, the DOT's former authority under the penalty provisions of § 322(g) must now be read as based instead

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[4] Subchapter II of chapter 105 of the Interstate Commerce Act [now codified at 49 U.S.C. §§ 10521-10529] exempts private carriers from the ICC's jurisdiction. 40 U.S.C. § 10521 states that the ICC has jurisdiction over "transportation by motor carrier." 49 U.S.C. § 10102(14) defines a "motor private carrier" as a person "other than a motor carrier." Before the passage of the Department of Transportation Act, § 304(a)(3) included private carriers in the definition of "motor carriers" under the ICC's jurisdiction for certain limited purposes. The Department of Transportation Act transferred the ICC's powers under § 304(a)(3) to the DOT. 49 U.S.C. § 1655(e)(6)(C). From that point on the ICC no longer had jurisdiction over private carriers.

upon § 11909(b), and § 11909(b) only authorizes penalties with respect to transportation subject to the ICC's jurisdiction. It is undisputed that at the time when this replacement statute was enacted, the ICC had no jurisdiction over private motor carriers, nor does it have that jurisdiction presently. Thus, although the DOT retains its power to issue regulations for private motor carriers, RSR argues that a congressional oversight has robbed these regulations of any enforcement through penal sanctions.

The government responds that the original § 322(g) by its terms did not apply to private carriers either, but only did so through reference to § 304(a)(3). Thus the fact that § 304(a)(3) remains in force allows § 11909(b) to apply to private carriers.

This argument is tempting but it does not prove the government's desired conclusion. If we substitute the new statute for the old in § 304(a)(3) as required by the Recodification Act, we obtain the following:

> (a) It shall be the duty of the Commission—
>
> . . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and section[ ] . . . [11909(b)] . . . of this title.

However, the term "motor carrier," which was the operative term expanding the scope of § 322(g) to encompass private motor carriers, does not appear at all in § 11909(b). § 322(g) applies to "[a]ny motor carrier . . . who shall willfully fail or refuse to make a report to the Commission as required by this chapter . . ." Thus,

read in conjunction with § 304(a)(3), it is clear that § 322(g) would apply to private carriers to the extent that the ICC (or later, the DOT) issued regulations authorized by § 304(a)(3). On the other hand, § 11909(b) does not refer to "motor carriers" as defined in § 304(a)(3); rather, its scope is limited to "person[s] required to make a report to the Commission ... about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title." The ICC, however, has had no jurisdiction over private carriers since 1966. Its powers under § 304(a)(3), which might have given it jurisdiction, have been transferred to the Department of Transportation. Hence § 304(a)(3) cannot help the government get around the clear language of § 11909(b).

To this it may be objected that what Congress clearly meant to say in § 11909(b) was "subject to the jurisdiction of the Commission prior to the Department of Transportation Act." We then would look to § 304(a)(3) to see what the jurisdiction of the ICC was before 1966 and, finding that it included private motor carriers, all would be well. The problem is that although this is what Congress clearly meant to say, intended to say, and wanted to say, still Congress did not say it. It said something which, on its face, appears very different: we are instructed instead to look to the present jurisdiction of the ICC, which does not govern private carriers.

The government poses a second argument, based upon the Department of Transportation Act itself. If we substitute the new statute for the old in §§ 1655(f)(2)(A) and (B) we obtain:

> ....
>
> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under

> the Interstate Commerce Act *as the Commission had before such transfer* with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).
>
> (B) For purposes of this paragraph—
>
> (i) the term "function" includes power and duty, and
>
> (ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: ... section[ ] ... § 11909(b). (emphasis added.)

The government's argument then goes as follows: Section 1655(e)(6)(C) transferred the ICC's functions under § 304(a)(3) to the DOT. These functions are what give enforcement power to the provisions of the former § 322(g) and the present § 11909(b). According to § 1655(f) then, with respect to powers under § 304(a)(3), the Secretary of the DOT now has the same administrative powers under § 11909(b) as the ICC had before the transfer. Before the transfer, the ICC had regulatory powers over private carriers under § 304(a)(3). It thus had jurisdiction over this sort of transportation. Thus the penalty provisions of § 11909(b) would apply to private carriers before the transfer. Hence the powers of enforcement under § 11909(b) over private carriers remain unchanged after the transfer to the DOT, and the DOT may impose regulations on private carriers enforced by penalties under § 11909(b).

The problem with this argument is that it depends upon an inquiry into what the ICC's powers under § 11909(b) were before the 1966 transfer. This is especially puzzling, given that § 11909(b) was not enacted until 1978.

The government may be arguing that the inquiry required by § 1655 should be what the ICC's powers *would have been* if § 11909(b) were in effect in 1966. But this is a strained construction of the statute and is not implied by its language. Neither § 11909(b) nor the Department of Transportation Act indicates why changes in the Interstate Commerce Act *subsequent* to the transfer should affect or relate back to an inquiry into what the ICC's powers were *prior* to the transfer. In reality, this argument suffers from the same problem as the first one: Congress should have made clear in the language of the statute what it meant, and it has not done so.

We are thus faced with situation in which the language of § 11909(b) on its face removes private carriers from its penalty provisions. The government argues that, sympathetically construed, the statute need not be so read. But we think it improper to stretch the language of the statute to that extent. We are especially mindful of the fact that we are dealing with a penal statute, and such statutes should be strictly construed.

Strict Construction

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States* v. *Wiltberger*, 5 Wheat. 76, 5 L.Ed. 37 (1820). Like all maxims of construction, its decisional force varies according to the facts and circumstances of each case and the maxim must be balanced against such countermaxims as construction according to the intent of the legislature and construction according to a reasonable reading of plain language. For example, it is often said that although penal statutes are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *Barrett* v. *U.S.*, 423 U.S. 212, 96 S.Ct. 298, 46 L.Ed.2d 450 (1976); *Huddleston* v. *U.S.*, 415 U.S. 814, 94 S.Ct.

1262, 39 L.Ed.2d 782 (1974); *United States* v. *Bramblett*, 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *American Fur Co.* v. *United States*, 2 Pet. 358, 7 L.Ed. 450 (1829); *United States* v. *Wiltberger*, *supra*; *United States* v. *Scrimgeour*, 636 F.2d 1019 (5th Cir. 1981). It is also said that the principle of strict construction does not mean that the narrowest possible construction must be given without concern for a manifest legislative purpose nor does it mean that common sense and the plain meaning of statutory language are to be disregarded. *United States* v. *Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); *United States* v. *Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); *United States* v. *Bramblett*, *supra*; *United States* v. *Brown*, 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *United States* v. *Scrimgeour*, *supra*; *United States* v. *Levy*, 579 F.2d 1332 (5th Cir. 1978), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979).

However, the present case is not one where manifest legislative intent is served by giving the words of the statute their plain and ordinary meanings. In both of the arguments the government has put forward, a rather creative interpretation of what is already a highly complex and confusing intermeshing of statutes is necessary to subject private carriers to the penal provisions of § 11909(b). We think this situation corresponds well to the purpose and motivation behind the maxim of strict construction. As the Supreme Court has explained:

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–222 [73 S.Ct. 227, 229, 97

> L.Ed. 260] (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States*, 283 U.S. 25, 27 [51 S.Ct. 340, 341, 75 L.Ed. 816] (1931) (Holmes, J.). See also *United States* v. *Cardiff*, 344 U.S. 174, [73 S.Ct. 189, 97 L.Ed. 200] (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurther [*sic*] and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. *Bass*, *supra*, at 347-48 (footnote omitted).[5] Due to the recodification of the Interstate Commerce Act, Congress has no longer "spoken in language that is clear and definite." Even if the government's arguments about the meaning of § 11909(b) and § 1655(e) and (f) are plausible interpretations of these statutes in the light of Congressional intent, these interpretations cannot be accepted, for the statutes themselves do not give private carriers clear notice of the illegality of their conduct. The plain language of § 11909(b), if anything, indicates that the conduct of private carriers is not subject to penal sanctions. Hence, based upon the considerations explained in

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[5] *See also United States* v. *Levy*, 533 F.2d 969, 973 & n.3 (5th Cir. 1976) (men of common intelligence cannot be required to guess at the meaning of a penal enactment).

United States v. *Bass*, we will apply the rule of strict construction in favor of defendant with respect to § 11909(b) and hold that RSR, a private carrier, cannot be punished under the statute's provisions.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

No. 80-1782

D.C. Docket No. CR3-80-084

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RSR CORPORATION, DEFENDANT-APPELLANT,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

Before RUBIN, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

JANUARY 4, 1982

ISSUED AS MANDATE: JULY 6, 1982

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-453-Oct. 14, 1980

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT *
UNIT A

No. 80-1782

Filed June 23, 1982

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RSR CORPORATION, DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (Opinion January 4, 1982, 5 Cir., 1982, 664 F.2d 1249).

(June 23, 1982)

Before RUBIN, RANDALL and TATE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTER FOR THE COURT:

/s/ CAROLYN DINUN RANDALL

United States Circuit Judge

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

No. 82-491

Office-Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner

v.

RSR CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

James W. Hightower
HIGHTOWER, ALEXANDER, COOK AND BIRNBAUM, P.C.
5801 Marvin D. Love Freeway,
Suite 301
Dallas, Texas 75237-2385
(214) 339-4108

COUNSEL FOR:
RSR CORPORATION, *Respondent*

QUESTION PRESENTED

Whether Congress changed the application of certain criminal penalty provisions for violation of Federal Motor Safety Regulations by private motor carriers when it recodified the Interstate Commerce Act.

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RSR CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, RSR Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion is reported at 664 F.2d 1249.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto as Appendix A, infra, la-14a.

JURISDICTION

Respondent accepts the jurisdictional statement of the Petitioner.

STATUTORY PROVISIONS INVOLVED

1. Section 204(a)(3) of the Interstate Commerce Act, 49 U.S.C. 304(a)(3) provides:

> (a) It shall be the duty of the (Interstate Commerce Commission—
>
> > (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of Subsection (c) of this section and Sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

2. 49 U.S.C. 10521, Subchapter II of Chapter 105 provides:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier—
>
> > (1) Between a place in—
> >
> > > (A) A State and a place in other States;
> >
> > > (B) A State and another place in the same State through another State;
> >
> > > (C) The United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) The United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) The United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) In a reservation under the exclusive jurisdiction of the United States or on a public highway.

3. 49 U.S.C. 10524, Subchapter II of Chapter 105 provides:

(a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over the transportation of property by motor vehicle when—

(1) The property is transported by a person engaged in a business other than transportation and

(2) The transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

4. 49 U.S.C. 322(g) (Repealed by Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1337) provided:

(a) Any motor carrier, broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this part, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willingly file with

the Commission any false report, account record, or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this part to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than $5,000. As used in this subsection, the words, "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained.

5. Subtitle IV, Title 49—Transportation, Section 11909(b) (Source 49 U.S.C. 322(g)), provides:

(a) A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle about transportation subject to the jurisdiction of the Commission under Subchapter II of Chapter 105 of this title, or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question within 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willingly falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7) knowingly and willingly makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

6. 49 U.S.C. 1655(e)(6)(C) of the Department of Transportation Act provides:

> (e) There are hereby transferred to and vested in the Secretary (of Transportation) all function, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—
>
> • • • • • • •
>
> (6) the following provisions of the Interstate Commerce Act, as amended—
>
> • • • • • • •
>
> (C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and sections 204(a)(3), 3(a), and (5) (49 U.S.C. 304).

7. 49 U.S.C. 1655(f)(2)(A) and (B) provides:

> (2)(A) With respect to any function which is transferred to the Secretary (of Transportation) by Subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by Subsection (e).
>
> (2)(B) For purposes of this paragraph—
>
> (i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: * * * Section ( ) * * * 222 (except Subsections (b)(2) and (b)(3) thereof) * * *.

8. Section 3 of the Interstate Commerce Act, entitled "Legislative Purpose and Construction," provides in pertinent part (Pub. L. No. 95-473, 92 Stat. 1466):

(a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superceding it to the extent of the inconsistency.

(b) A reference to a law replaced by Sections 1 and 2 of this Act, including a reference in the regulation, order or other law, is deemed to refer to the corresponding provision enacted by this Act.

(c) An order, rule, or regulation in effect under a law replaced by Sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by Sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all invalid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

STATEMENT

RSR Corporation (RSR) accepts the statement of the case as stated in the Court of Appeals opinion as being the correct statement of this case.

The government's statement is not completely accurate. The government's statement goes outside the record, makes conclusions, and attempts to inject prejudice in the case in order to influence this Court into granting the Petition for Writ of Certiorari. The government's statement is inaccurate or outside the record as follows:

1. There is nothing in the record to indicate the number of private motor carriers subject to the jurisdiction of the Department of Transportation (DOT).

2. The testimony regarding previous violations was that there were such violations in 1968 and 1972 and that none of the violations concerned false driver's daily log books. Further, there was an eight year period lapse in which period no violations were shown. (Tr. 47, 48)

3. The sentence regarding hundreds of violations of the motor carrier safety regulations was nothing but heresay. The Assistant United States Attorney stated himself that the comments that he was making to the Court were based on what some other party had told him. (Tr. 46)

4. Note 2 on Page 5 of the Petition makes the statement that 49 U.S.C. 11909(b) imposes criminal penalties for willfully maintaining false records, including

records required by 49 C.F.R. 395.8, which, when it is referring to private motor carriers, is nothing more than a conclusion on the government's part and in direct opposition to the holding of the Court of Appeals, Fifth Circuit. By the express terms of 49 U.S.C. 11909(b) private carriers are not included under that section.

5. The second paragraph on Page 6 of the Petition which begins with "The Court reached. . . ." fails to note that the Court of Appeals' complete statement is "that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. Section 322(g) and if that statute was still in effect.". However, the only vehicle to Section 322(g) was through Section 304(a)(3).

REASONS WHY THE WRIT SHOULD BE DENIED

The Supreme Court should deny this Petition for a Writ of Certiorari because the Court of appeals, in a very well written and well reasoned opinion, correctly held that "due to the 1978 recodification of the Interstate Commerce Act, criminal penalties for violations of 49 C.F.R. Section 395.8 no longer applies to private motor carriers.".

RSR was convicted of violating 49 C.F.R. Section 395.8 and subjected to criminal penalties under 49 U.S.C. Section 11909(b). Section 395.8 was issued by the Department of Transportation (DOT) under the authority of 49 U.S.C. Section 304. Section 11909(b) is part of Subtitle IV of Title 49, U.S.C. "Transportation" (Pub. L. 95-473, 92 Stat. 1337, Act of Oct. 17, 1978, hereinafter referred to as "Recodification Act"). RSR as a private motor carrier is not subject to the jurisdiction of the Interstate Commerce Commission under Subchapter II of Chapter 105 of Subtitle IV of Title 49, U.S.C., "Transportation". 49 U.S.C. Section 10524. Prior to the enactment of the DOT Act on October 15, 1966, the only statute which would

have given the Interstate Commerce Commission authority over private carriers was contained in Section 304(a)(3) and which authority was transferred from the Interstate Commerce Commission to the DOT pursuant to Section 1655(e)(6)(C). After the passage of the DOT Act, regulation of private motor carriers was no longer under the jurisdiction of the ICC. 49 U.S.C. Section 1655(f)(2)(A). As explained by the Court of Appeals, the penalty provisions pertaining to private motor carriers is obtained through Section 304(a)(3), which was not repealed or replaced by the "Recodification Act".

The main thrust of the government's argument in its Petition for a Writ of Certiorari is that the Interstate Commerce Act was recodified "without substantive change". The government is asking this Court to hold that Section 11909(b) subjects private motor carriers to penalties under that section even though the plain language of Section 11909(b) indicates that the conduct of private carriers is not subject to penal sanctions. The government basis its argument on Section 3(a) of the "Recodification Act" entitled "Legislative Purpose and Construction," which states that "Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced herein." The government further states that Section 3(c) provides that "An order, rule or regulation in effect under a law replaced by Sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded."

The Court of Appeals poignantly pointed out that jurisdiction of private motor carriers, as pertinent herein, is obtained through Section 304(a)(3) which was not recodified under Subtitle IV of Title 49 United States Code, "Transportation". Therefore, Section 3(a) of the "Recodification Act" has no application to Section 304(a)(3), because it wasn't changed,

amended or replaced by the "Recodification Act". The Court of Appeals' analysis of Section 304(a)(3) as it relates to Section 322(g) and Section 11909(b) is well reasoned and adopted by the Respondent. Reference is hereby made to the Court of Appeals' opinion as shown in Appendix A, infra, la-14a. Therefore, since there is no penalty, there is no crime. *Mossew* v. *United States,* 266 F. 18 (2d Cir. 1920).

The Second Circuit in *United States* v. *Rossetti Bros.,* 671 Fed. 2d 718 (2d Cir., 2/3/82), which was decided subsequent to this case, failed to recognize that 49 C.F.R. 395.3(a) and (b) was promulgated by the DOT and not the Interstate Commerce Commission. In fact, the Second Circuit on Page 720 states the following: "No statute other than Section 11914(b) even arguably defines the punishment for their violation." i.e. violation of 49 C.F.R. Section 395.3(a)(b). It is believed that if the Second Circuit had been appraised of the two different Acts, i.e. the Department of Transportation Act and Interstate Commerce Act, that the Court would have arrived at a different decision which would have been in conformance with the decision of the Court of Appeals for the Fifth Circuit. It is further submitted to the Court that the opinion of the Court of Appeals, Fifth Circuit, is the better reasoned opinion.

Congress passed the "Recodification Act" effective October 17, 1978. Since that time Congress has amended Subtitle IV—Interstate Commerce, 49 United States Code, "Transportation" by Pub. L. 96-296 effective 7-1-80; Pub. L. 96-454 effective 10-15-80; by the Bus Regulatory Reform Act of 1982, Pub. L. 97-261 and by H.R. 6955, the Omnibus Budget Reconciliation Act of 1982 (Pub. L. 97-253). As the government points out, a bill has been introduced in Congress, known as H.R. 6993, 97th Congress, 2d Sess., Sections 6,522 (1982), which will address the concerns of the Court of Appeals in this matter. This is a further reason why the Supreme Court should not grant the Petition for a Writ of Certiorari. The Court will

notice that Congress has not been overly concerned with the fact that it has failed to include a penalty for the violation of 49 C.F.R. 395.8 by private motor carriers.

The opinion of the Court of Appeals in this case is correct and there is no important policy reason why this Court should concern itself in this case by granting the Petition for a Writ of Certiorari. Congress can correct this matter if it deems that it is necessary to correct the same.

The part of the Court of Appeals' opinion regarding the construction of Section 11909(b) is correct. In addition to the authorities cited in the Court of Appeals' opinion, I would call this Court's attention to its opinion in *United States* v. *Cardiff*, 344 U.S. 174 wherein this Court stated on Page 190 the following:

> "However we read Section 301(f) we think it is not fair warning, cf. *United States* v. *Weitzel*, 246 U.S. 533, 39 S.Ct. 381, 62 L.Ed. 872; *McBoyle* v. *United States*, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816, to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid, cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, may be as much of a trap for the innocent as the ancient laws of Caligula."

In this case, Section 11909(b) indicates on its face that it only applies to persons who are subject to the jurisdiction of the Commission under Subchapter II of Chapter 105 of 49 U.S.C., "Transportation". A motor private carrier is not subject to the Commission under Subchapter II of Chapter 105. A person reading all of the penalty statutes would find that they only apply to persons or carriers that are subject to the jurisdiction of the Interstate Commerce Commission, i.e., a rail carrier, common or contract carrier, water carrier or freight forwarder. Since a private motor carrier is not subject to the jurisdiction of

the Interstate Commerce Commission in any way, the reading of the statutes would not inform a motor private carrier that it could be penalized under any of these civil and criminal penalties in Chapter 119 of 49 U.S.C., "Transportation". This Court's opinion in *United States* v. *Cardiff*, supra, supports the holding of the Court of Appeals, Fifth Circuit in this case.

CONCLUSION

The Supreme Court should Jeny the Petition for a Writ of Certiorari.

Respectfully submitted,

HIGHTOWER, ALEXANDER, COOK AND BIRNBAUM, P.C.

By _____
James W. Hightower
Suite 301 Allied Bank—
Southwest Bldg.
5801 Marvin D. Love Freeway
Dallas, Texas 75237-2385
(214) 339-4108

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RSR CORPORATION,
Defendant-Appellant

No. 70-1782

United States Court of Appeals,
Fifth Circuit*
Unit A

January 4, 1982

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, RANDALL and TATE, Circuit Judges.

Per CURIAM:

This case presents the issue of whether Congress inadvertently changed the application of certain criminal penalty provisions for violation of federal motor safety regulations when it recently recodified the Interstate Commerce Act. We conclude that Congress has done so.

The primary business of defendant RSR Corporation is the recycling of salvaged batteries and the selling of lead taken from these batteries. RSR operates a large fleet of trucks in the course of its business. These trucks are not for hire, and they are used to transport RSR's property across state lines. On April 21, 1980 the government filed an information containing eight counts against RSR charging a criminal violation of the

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Federal Motor Carriers Safety Regulations. Specifically, the government charged that RSR had maintained false daily driver logs in violation of 49 C.F.R. 395.8.[1] It claimed that a violation of these regulations subjected RSR to criminal penalties under 49 U.S.C. Section 11909(b), which imposes fines for willful falsification of such records. RSR moved to dismiss the counts of the information on the grounds that it was a private motor carrier and that Section 11909(b), did not apply criminal penalties to private carriers. The trial court denied RSR's motion on June 16, 1980. On June 23, 1980, RSR entered a plea of guilty to counts 1, 3, 5, 7, and 8 of the information. The other counts were dismissed. RSR now appeals from the denial of its motion to dismiss the entire information. We reverse.

Our view, simply stated, is that due to the 1978 recodification of the Interstate Commerce Act, criminal penalties for violations of 49 C.F.R. Section 395.8 no longer apply to private motor carriers.[2] The language of the present penalty provision, 49 U.S.C. Section 11909(b), compels this result, even though the corresponding pre-recodification provision, 49 U.S.C. Section 322(g), would have permitted penal sanctions against private carriers. To understand why this is so, a discussion of the history of the relevant statutory provisions of the Interstate Commerce Act is necessary.

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[1] 49 C.F.R. Section 395.8 (1980) provides, in pertinent part:

Section 395.8 *Driver's daily log.*

(a) Except as provided in Section 395.8 and paragraph (t) of this section, every motor carrier shall require that a driver's daily log, form MCS-59, shall be made in duplicate by every driver used by the carrier and every driver who operates a motor vehicle shall make such a log. Failure to make logs, failure to make required entries therein, falsification of entries, or failure to preserve logs shall make both the driver and the carrier liable to prosecution . . .

[2] The government has not contested for purposes of this appeal that RSR is a private motor carrier within the meaning of the Interstate Commerce Act. See 49 U.S.C. Section 10102(14).

Statutory History

Congress enacted Part II of the Interstate Commerce Act on August 9, 1935. Pub. L. No. 72-225, 49 Stat. 543 (originally codified at 49 U.S.C. Sections 301-327; presently codified in scattered sections of 49 U.S.C.). The new additions to the Interstate Commerce Act empowered the Interstate Commerce Commission to regulate various aspects of transportation of property by motor carriers engaged in interstate commerce, depending upon whether the carrier was classified as a common, contract, or private carrier. Section 204(a)(3) of the new Act, as codified in 49 U.S.C. Section 304(a)(3), gave the ICC powers to promulgate regulations governing the safety of operations of private motor carriers:

> (a) It shall be the duty of the Commission—
>
> . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f) and (g), and 324 of this title.

At issue in this case are a set of regulations issued under authority of 49 U.S.C. Section 304(a)(3) describing requirements for keeping and maintaining accurate daily driver logbooks. 49 C.F.R. Section 395.8.

The penalty provisions for failure to comply with these regulations were originally contained in 49 U.S.C. Section 322(g) (current version at 49 U.S.C. Section 11909(b)):

> Any *motor carrier,* broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission *as required by this chapter,* or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file with the Commission any false report, account, record or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this chapter to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject to each offense to a fine of not more than $5,000. As used in this subsection the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained. (emphasis added).

These penalty provisions applied to private motor carriers because of Section 304(a)(3), which specifically mentions Section 322(g) as a provision where the definition of "motor carrier" includes private carriers.

On October 15, 1966, Congress created the Department of Transportation by means of Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. Sections 1651 et seq.) (hereinafter referred to as the "Department of Transportation Act"). Con-

gress transferred the ICC's authority to regulate private motor carriers under Section 304(a)(3) to the DOT. 49 U.S.C. Section 1655(e)(6)(C) provided that:

> (e) There are hereby transferred to and vested in the Secretary (of Transportation) all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—
>
> . . . . . .
>
> (6) the following provisions of the Interstate Commerce Act as amended—
>
> (C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service employees and safety of operation and equipment; and sections 204(a)(3), (3a), and (5) (49 U.S.C. 304).

49 U.S.C. Section 1655 (f) gave the DOT several functions and administrative powers formerly held by the ICC, including those under Section 322(g):

> . . .
>
> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (3).
>
> (B) For purposes of this paragraph—
>
> (i) the term "function" includes power and duty, and

> (ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: . . . section ( ) . . . 222 (codified as 49 U.S.C. Section 322) (except subsections (b) (2) and (b)(3) thereof) . . .

After the passage of the Department of Transportation Act, regulation of private motor carriers was no longer under the jurisdiction of the ICC. 49 U.S.C. Section 1655(f)(2)(A).

On October 17, 1978, in a laudatory effort to recodify parts of the Interstate Commerce Act, Congress enacted Pub. L. No. 93-473, 92 Stat. 1337 (codified at 49 U.S.C. Sections 10101-11916) (hereinafter referred to as the "Recodification Act"). It is undisputed that through this recodification, Congress intended no substantive change in the Interstate Commerce Act and related laws. See H.R. Rep. No. 95-1395, 95th Cong., 1st Sess. 4, 9-10 (1978), *reprinted in* (1978) U.S. Code Cong. & Ad. News 3009, 3012-13, 3018. The purpose of the recodification was merely to simplify language, replace obsolete terms, and eliminate superseded and obsolete material.[3]

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[3] The legislative history is echoed in the words of the Recodification Act itself. Section 3 of the Act, entitled "Legislative Purpose and Construction," stated that:

> (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this act are considered as superseding it to the extent of the inconsistency.
>
> (b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in the regulation, order or other law, is deemed to refer to the corresponding provision enacted by this Act.
>
> (c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(footnote continued on following page)

Nevertheless, the provision enacted by Congress to replace 49 U.S.C. Section 322(g), 49 U.S.C. 11909(b), differs significantly from the former provision in its language:

> A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle *about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title,* or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question in 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willfully falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7) knowingly and willfully makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

(emphasis added)

(footnote continued from previous page)

> (d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.
>
> (e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.
>
> (f) If a provision enacted by this Act is held invalid, all invalid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.
>
> Publ. L. 94-453, Oct. 17, 1978, 92 Stat. 1466.

By its terms 49 U.S.C. Section 11909(b) does not apply to private motor carriers, since these are not within the jurisdiction of the ICC due to the 1966 Department of Transportation Act.[4] Hence, argues RSR, the penalty provisions of Section 11909(b) do not apply to it and the government's information against RSR under Section 11909(b) should have been dismissed.

The parties do not dispute that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. Section 322(g) and if that statute were still in effect. However, the government concedes that Section 322(g) has been repealed by the Recodification Act because it has been replaced by Section 11909(b). The Act requires that any reference to a former statute be deemed a reference to its replacement. Thus, under the Department of Transportation Act, 49 U.S.C. Section 1655, the DOT has the power to promulgate regulations for private carriers under Section 304(a)(3), for that section has not yet been recodified and remains in force. However the DOT's former authority under the penalty provisions of Section 322(g) must now be read as based instead upon Section 11909(b), and Section 11909(b) only authorizes penalties with respect to transportation subject to the ICC's juridication. It is undisputed that at the time when this replacement statute was enacted, the ICC had no jurisdiction over private motor carriers, nor does it have that jurisdiction presently. Thus, although the DOT retains its power to

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[4] Subchapter II of chapter 105 of the Interstate Commerce Act (now codified at 49 U.S.C. Sections 10521-10529) exempts private carriers from the ICC's jurisdiction. 40 U.S.C. Section 10521 states that the ICC has jurisdiction over "transportation by motor carrier." 49 U.S.C. Section 10102(14) defines a "motor private carrier" as a person "other than a motor carrier."

Before the passage of the Department of Transportation Act, Section 304(a)(3) included private carriers in the definition of "motor carriers" under the ICC's jurisdiction for certain limited purposes. The Department of Transportation Act transferred the ICC's powers under Section 304(a)(3) to the DOT. 49 U.S.C. Section 1655(e)(6)(C). From that point on the ICC no longer had jurisdiction over private carriers.

issue regulations for private motor carriers, RSR argues that a congressional oversight has robbed these regulations of any enforcement through penal sactions.

The government responds that the original Section 322(g) by its terms did not apply to private carriers either, but only did so through reference to §304(a)(3). Thus the fact that Section 304(a)(3) remains in force allows Section 11909(b) to apply to private carriers.

This argument is tempting but it does not prove the governments's desired conclusion. If we substitute the new statute for the old in Section 304(a)(3) as required by the Recodification Act, we obtain the following:

> (a) It shall be the duty of the Commission—
>
> . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and section ( ) . . . (11909(b) . . . of this title.

However, the term "motor carrier," which was the operative term expanding the scope of Section 322(g) to encompass private motor carriers, does not appear at all in Section 11909(b). Section 322(g) applied to "(a)ny motor carrier . . . who shall willfully fail or refuse to make a report to the Commission as required by this chapter . . ." Thus, read in conjunction with Section 304(a)(3), it is clear that Section 322(g) would apply to private carriers to the extent that the ICC (or later, the DOT) issued regulations authorized by Section 304(a)(3). On the other hand, Section 11909(b) does

not refer to "motor carriers" as defined in Section 304(a)(3); rather, its scope is limited to "person(s) required to make a report to the Commission . . . about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title." The ICC, however, has had no jurisdiction over private carriers since 1966. Its powers under Section 304(a)(3), which might have given it jurisdiction, have been transferred to the Department of Transportation. Hence Section 304(a)(3) cannot help the government get around the clear language of Section 11909(b).

To this it may be objected that what Congress clearly meant to say in Section 11909(b) was "subject to the jurisdiction of the Commission prior to the Department of Transportation Act." We then would look to Section 304(a)(3) to see what the jurisdiction of the ICC was before 1966 and, finding that it included private motor carriers, all would be well. The problem is that although this is what Congress clearly meant to say, intended to say, and wanted to say, still Congress did not say it. It said something which, on its face, appears very different: we are instructed instead to look to the present jurisdiction of the ICC, which does not govern private carriers.

The government poses a second argument, based upon the Department of Transportation Act itself. If we substitute the new statute for the old in Sections 1655(f)(2)(A) and (B) we obtain:

> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act *as the Commission had before such transfer* with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).

(B) For purposes of this paragraph—

(i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: ... section ( ) ... Section 11909(b). (emphasis added)

The government's argument then goes as follows: Section 1655(e)(6)(C) transferred the ICC's functions under Section 304(a)(3) to the DOT. These functions are what give enforcement power to the provisions of the former Section 322(g) and the present Section 11909(b). According to Section 1655(f) then, with respect to powers under Section 304(a)(3), the Secretary of the DOT now has the same administrative powers under Section 11909(b) as the ICC had before the transfer. Before the transfer, the ICC had regulatory powers over private carriers under Section 304(a)(3). It thus had jurisdiction over this sort of transportation. Thus the penalty provisions of Section 11909(b) would apply to private carriers before the transfer. Hence the powers of enforcement under Section 11909(b) over private carriers remain unchanged after the transfer to the DOT, and the DOT may impose regulations on private carriers enforced by penalties under Section 11909(b).

The problem with this argument is that it depends upon an inquiry into what the ICC's powers under Section 11909(b) were before the 1966 transfer. This is especially puzzling, given that Section 11909(b) was not enacted until 1978.

The government may be arguing that the inquiry required by Section 1655 should be what the ICC's powers *would have been* if Section 11909(b) were in effect in 1966. But this is a strained construction of the statute and is not implied by its

language. Neither Section 11909(b) nor the Department of Transportation Act indicates why changes in the Interstate Commerce Act *subsequent* to the transfer should affect or relate back to an inquiry into what the ICC's powers were *prior* to the transfer. In reality, this argument suffers from the same problem as the first one: Congress should have made clear in the language of the statute what it meant, and it has not done so.

We are thus faced with a situation in which the language of Section 11909(b) on its face removes private carriers from its penalty provisions. The government argues that, sympathetically construed, the statute need not be so read. But we think it improper to stretch the language of the statute to that extent. We are especially mindful of the fact that we are dealing with a penal statute, and such statutes should be strictly construed.

Strict Construction

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States* v. *Wiltberger,* 5 Wheat. 76, 5 L.Ed. 37 (1820). Like all maxims of construction, its decisional force varies according to the facts and circumstances of each case and the maxim must be balanced against such countermaxims as construction according to the intent of the legislature and construction according to a reasonable reading of plain language. For example, it is often said that although penal statutes are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *Barrett* v. *U.S.,* 212, 96 S.Ct. 298, 46 L.Ed.2d 450 (1976); *Huddleston* v. *U.S.,* 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974); *United States* v. *Bramblett,* 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *American Fur Co.* v. *United States,* 2 Pet. 358, 7 L.Ed. 450 (1829); *United States* v. *Wiltberger,* supra; *United States* v. *Scrimgeour,* 636 F.2d 1019 (5th Cir. 1981). It is also said that the principle of

strict construction does not mean that the narrowest possible construction must be given without concern for a manifest legislative purpose nor does it mean that common sense and the plain meaning of statutory language are to be disregarded. *United States* v. *Moore,* 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); *United States* v. *Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); *United States* v. *Bramblett,* supra; *United States* v. *Brown,* 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *United States* v. *Scrimgeour,* supra; *United States* v. *Levy,* 579 F.2d 1332 (5th Cir. 1978), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979).

However, the present case is not one where manifest legislative intent is served by giving the words of the statute their plain and ordinary meanings. In both of the arguments the government has put forward, a rather creative interpretation of what is already a highly complex and confusing intermeshing of statutes is necessary to subject private carriers to the penal provisions of Section 11909(b). We think this situation corresponds well to the purpose and motivation behind the maxim of strict construction. As the Supreme Court has explained:

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken the language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 (73 S.Ct. 227, 229, 97 L.Ed. 260) (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States,* 283 U.S. 25, 27, (51 S.Ct. 340, 341, 75 L.Ed. 816)(1931)(Holmes, J.). See also *United States* v. *Cardiff,* 344 U.S. 174, (73 S.Ct. 189, 97 L.Ed. 200) (1952). Second, because of the seriousness of criminal penalties,

> and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurther and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. *Bass*, supra, at 347-48 (footnote omitted).[5]

Due to the recodification of the Interstate Commerce Act, Congress has no longer "spoken in language that is clear and definite." Even if the government's arguments about the meaning of Section 11909(b) and Section 1655(e) and (f) are plausible interpretations of these statutes in the light of Congressional intent, these interpretations cannot be accepted, for the statutes themselves do not give private carriers clear notice of the illegality of their conduct. The plain language of Section 11909(b), if anything, indicates that the conduct of private carriers is not subject to penal sanctions. Hence, based upon the considerations explained in *United States* v. *Bass*, we will apply the rule of strict construction in favor of defendant with respect to Section 11909(b) and hold that RSR, a private carrier, cannot be punished under the statute's provisions.

REVERSED.

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[5] See also *United States* v. *Levy*, 533 F.2d 969, 973 & n.3 (5th Cir. 1976) (men of common intelligence cannot be required to guess at the meaning of a penal enactment).